United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 26, 1996

TO : William C. Schaub, Regional Director
Region 7

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: The Observer & Eccentric Newspapers
Case 7-CA-37826

524-0167-1033
524-5012-4000
524-5012-7000
524-0167-1033-5000

This case was submitted for advice as to whether the Employer's refusal to hire an employee because he was on strike against another employer was inherently destructive of employees' Section 7 rights under Great Dane Trailers. [1]

FACTS

The Detroit News publishes a daily newspaper in Detroit, Michigan. Newspaper Guild Local 22 ("Local 22" or "Union") represents the Detroit News' approximately 225 editorial department employees. The last collective-bargaining agreement between the parties expired on April 30, 1995. [2] On July 13, after unsuccessful contract negotiations, members of Local 22 as well as five other unions went on strike against the News and its competitor, the Detroit Free Press. Robert Louis Erickson (the Charging Party), a copy editor at Detroit News and member of Local 22, also went on strike.

The Observer & Eccentric Newspapers (the Employer), publishes several community papers in the Detroit Metropolitan area. On October 22, the Charging Party contacted Karen Hermes-Smith, Editor of the Employer's Clarkston paper, regarding a part-time copy editor position.[3] She indicated that the position had been

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[1] NLRB v. Great Dane Trailers, 388 U.S. 26 (1967).

[2] All dates hereafter are in 1995 unless specified otherwise.

[3] The Charging Party had been a reporter and an editor at the Employer from 1976-1979.

filled, but that the same position was available at the Employer's Rochester office. She also stated that her counterpart in Rochester, Dave Varga, was anxious to fill the position, because the person he was training suddenly quit to take another position.

The Charging Party contacted Dave Varga and identified himself as both a former employee of the Employer and a striking Detroit News employee. Varga indicated to the Charging Party that the part-time copy editor position became vacant by the sudden departure of the previous copy editor, Craig Garrett, who had left him "in the lurch." Varga stated that the position was ten hours on Tuesday, eight hours on Wednesday, and ten hours on Friday, and the Charging Party indicated that the hours were ideal. Varga implied that he would like to hire the Charging Party but that his strike activity might present "complicating factors." Varga informed the Charging Party that if there were some corporate objections to hiring a striker who may return to his former job, he might be able to hire the Charging Party as a temporary. The Charging Party indicated that he would be pleased with a temporary position.

A few hours after the Charging Party's preceding conversation with Varga, Varga contacted the Charging Party and stated on the Charging Party's answering machine as the Charging Party entered his home:

> Hello Bob, this is Dave Varga from the Observer and Eccentric. It doesn't look good. I talked to our personnel manager and she said basically, our policy is intact and we are not hiring, using as temps, anything of the sort, people who are on strike. So, if you want to give me a call back, I'm at 651-7575, but as of now that's the status.

The Charging Party then picked up the telephone and Varga told him that the decision not to hire any strikers, even for a temporary position, came from the highest levels of management. The Charging Party inquired as to whether Varga meant the company chairman. Varga replied no, that he meant Richard Aginian, President, and the personnel director. Varga further indicated that he believed that there was an "unholy alliance" between the Employer and the Detroit newspapers. The Charging Party asked Varga if he

would be eligible for hire if he formally resigned from his position with the Detroit News. Varga told the Charging Party that he was uncertain as to whether a formal resignation from Detroit News would make the Charging Party eligible for employment. He also stated that if the Charging Party resigned from the Detroit News, to let him know. Varga then indicated that he was sorry he could not hire him and that he would keep his name and phone number in the event the Employer's policy changed.

The Region's investigation revealed that several striking Detroit newspaper reporters also sought employment with the Employer without success. Lawrence Perl, a striking reporter, indicated that Sherri Huffman, a personnel employee, told him that she was uncertain as to the Employer's policy on hiring striking newspaper employees. When Perl contacted the Employer regarding employment opportunities, he was continuously referred from one person to another, and as a result ceased seeking employment with the Employer. Eugene Schabath was told in October by several of the Employer's officials that no employment opportunities were available. Yet, at the time Schabath sought employment, the Employer was advertising an available position in the newspaper. Furthermore, Sue Rosiek, managing editor for the Employer, told Lynn Henning, a striking reporter, in September, that there were employment opportunities for reporters and editors. The issue of the strike arose, specifically its duration and outcome, during Henning's conversations with Rosiek. Henning never received an offer from the Employer.

The Employer has hired 193 striking employees of the Detroit newspapers, and two sons of the Chief Administrative Officer and head negotiator for Local 22. However, all of the hired striking employees work in the pressroom, the mailroom or the composing room where they perform journeyman level duties. The Employer failed to demonstrate that it hired any striking reporters or editors.

The Employer contends that the Charging Party was not offered the copy editor's position because he lacked recent community newspaper experience, and because the Employer was concerned that once the strike ended, the Charging Party would immediately return to the Detroit News, since his seniority and wages and benefits were higher there.

The Employer would then have to spend the money to find and train another candidate for the position. The Employer further notes that the Charging Party never filled out an application for employment and the position was never filled due to reassignments and redistribution of staff.

ACTION

We conclude, in agreement with the Region, that the Employer refused to hire the Charging Party because he was striking another newspaper, and that this refusal was unlawful as inherently destructive of employees' Section 7 rights.

In Great Dane Trailers, the Supreme Court found a violation of Section 8(a)(3) when the employer refused to pay accrued vacation benefits to striking employees, as opposed to nonstrikers, even in the absence of any evidence of an anti-union motive:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an anti-union motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.[4]

[4] 388 U.S. at 34. See also NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); NLRB v. Brown, 380 U.S. 278 (1965); American Ship Building Co. v. NLRB, 380 U.S. 300 (1965).

In A. S. Abell, [5], where the ALJ relied upon Great Dane and Erie Resistor, supra, the Board affirmed the ALJ's conclusion that a discriminatory ban against employment of strikers was inherently destructive of important employee rights. There, upon the expiration of a collective-bargaining agreement between the Washington Post (Post), a newspaper publisher, and the union, the local representative of the Post's pressmen, the union went on strike. Immediately following this, a riot broke out during which a foreman was beaten, presses were set afire, equipment was extensively damaged, and picketing outside the Post's premises occurred accompanied and followed by mass picketing and sporadic outbreaks of property damage and violence.

Shortly thereafter, two Post pressmen sought employment with the A.S. Abell Company (the employer), another newspaper publisher. The employer attempted to learn from the Post the identities of the pressmen involved in the strike misconduct. When this effort failed, the employer adopted a policy of refusing to employ any Post pressmen. The employer thus refused to hire the two referred applicants even though it did not know whether they had been present during the Post strike misconduct.

The employer contended that the employment of participants in the Post incidents would invite similar violence and destruction at its facilities; that the formulation of its policy to refuse to employ any Post pressmen related solely to the unprotected and unlawful activities of an undetermined number of unidentified Post pressmen; and that its policy was necessary because it was impossible to identify the individual pressmen who were responsible for the property destruction and violence at the Post. [6]

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[5] A. S. Abell Co., 234 NLRB 802, 808 (1978), enforcement denied 598 F.2d 876 (4th Cir. 1979)(the Court of Appeals rejected the Board's rationale and held that the employer's policy against employment of strikers was fair and equitable when used as a vehicle to protect its property and preserve discipline against the unlawful conduct of employees).

The ALJ concluded, and the Board affirmed, that the employer's ban against the employment of strikers was inherently destructive of important employee rights, and bore its own indicia of intent for which the employer must bear the unavoidable consequences. [7] The Board further adopted the ALJ's determination that even if the adverse effect of the employer's discrimination were regarded as "comparatively slight", the employer's business considerations, as set forth above, were inadequate to establish a "legitimate and substantial business justification." [8] Moreover, the Board affirmed the ALJ's conclusion that "there is no escaping the glaring fact that the very base of the justification offered was the prevention of or interference with lawful union activity, and the very method was discrimination against employees for engaging in protected union activity." [9]

The Board in A. S. Abell distinguished the earlier case of Timken Roller Bearing, [10] where the Board adopted an ALJ's decision that the employer had not violated Section 8(a)(1) and (3) by refusing to hire an applicant who had engaged in a strike at another employer. In Timken, the employer's policy was to hire "permanent-type" employees. The employer interpreted the words "on strike" on an application as indicating that an applicant might not be a permanent employee, although the employer did not draw this conclusion without first interviewing an applicant. The applicant in Timken never severed his connection with his struck employer, never tried to obtain a termination slip from the latter and never told the employer that he was severing his employment relationship with his struck employer or that he wanted to change jobs. Thus, the Board in Timken affirmed the ALJ's finding that the General

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[6] Id. at 807.

[7] "The respondents assert that their target was the unlawful conduct, not the union activity, but this was not the thrust of their policy or its implementation." Id. at 808.

[8] Id.

[9] Id. at 808-809.

[10] Timken Roller Bearing Co., 187 NLRB 273, 275 (1970).

Counsel failed to demonstrate that the applicant had applied for a permanent job and was not hired only because he was on strike. [11] The Board in A. S. Abell distinguished Timken on the grounds that the basis of the employer's justification in A.S. Abell was the protected union activity of striking while the justification in Timken, i.e., the policy of not employing temporary employees, was purely economic and unrelated to the exercise of Section 7 rights.

The instant case is essentially controlled by A. S. Abell and distinguishable from Timken. The Employer here refused to hire referred individuals because they were on strike, and not because the Employer sought only permanent employees. Additionally, in Timken, an applicant could make himself acceptable for employment by severing his employment with the struck employer and so informing the employer. In the instant case, the Employer's policy against hiring strikers precluded the Charging Party from changing his status to make himself acceptable for employment. In this regard, we note that the Employer representative Varga admitted to the Charging Party that "our policy is intact and we are not hiring, using as temps, anything of the sort, people who are on strike." The Employer argues against a violation by pointing out that it has hired numerous other striking employees. This argument is unavailing since the evidence demonstrates that the Employer's policy is not to hire any reporters or editors because of their strike activity. It therefore is simply irrelevant that the Employer has not decided to discriminate against other units of striking employees. We also conclude that even if the Employer's policy was alternatively viewed as having a "comparatively slight" effect on the Section 7 right to strike, the Employer has

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[11] "There is nothing wrong with a striker working for others during a strike, but, so long as he considers himself still a striker and not a former employee of the struck employer, he is only seeking temporary employment. True, he could change his mind later on and stay with the second employer after the strike ended but this does not change the fact that he was only applying for temporary work. If the hiring employer was only hiring permanent employees it may refuse to hire one on strike without violating the Act." Timken, supra, 187 NLRB at 275.

proffered insufficient business justifications for such a discriminatory policy.

The Employer contends that the Charging Party was not hired because he lacked recent community newspaper experience, and because, after it spent the time and money to train him, he would return to the Detroit News when the strike ended, since his seniority and wages and benefits were higher there. The Employer further notes that the Charging Party never filled out an application for employment and the position was never filled due to reassignments and redistribution of staff.[12]

As to the Employer's business justification, we note that in A. S. Abell the employer claimed that if strikers were hired, they might engage in the same kind of violent and destructive activity that had occurred at the struck facility. The Board found that a fear of violent destruction fell short of a "legitimate and substantial business justification" for the employer's refusal to hire strikers. The Employer's justification here is even less compelling than the one rejected in A. S. Abell. Here, the Employer failed to pursue the Charging Party's inquiry into whether he would be eligible for hire if he formally resigned his position. Thus, the Employer's actual justifications are that the Charging Party might return to his previous job after the strike there ended and that the Employer would therefore have wasted time and expense in retraining the Charging Party.

Regarding the first point, we note that the Employer hired 193 striking workers from the pressroom, mailroom and composing room of the Detroit News and its competitor, the Detroit Free Press. Although these workers, like the Charging Party, could return to their previous jobs after the strike, the Employer nevertheless hired them. The Employer's hiring of all these similarly situated strikers undermines its assertion that it did not hire the Charging

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[12] The Employer's subsequent decision to not fill the position is irrelevant to the Employer's initial discriminatory decision of refusing to hire the Charging Party. Thus, this Employer argument raises questions only about the remedy for the discriminatory refusal to hire.

Party striker in fear that he would leave after the strike was over.[13]

Finally, as to the Employer's contention that the Charging Party lacked recent community newspaper experience, and needed training, we note that there is no evidence that this was so. Moreover, there is no evidence that the 193 striking employees that the Employer hired possessed the required training for their positions.[14] Therefore, in our view, the Employer's business justifications are weak and wholly insufficient for its hiring policy and inadequate to outweigh their adverse impact on Section 7 rights. The justifications, like that in A. S. Abell, are ultimately based on the Section 7 right to strike.

In sum, we conclude that the Region should issue a Section 8(a)(3) and (1) complaint, absent settlement, to allege that the Employer's hiring policy is inherently destructive of Section 7 rights, and that the Employer unlawfully failed to hire the named discriminatee because of his strike activity.

B.J.K.

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[13] [*FOIA Exemptions* 2 and 5

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[14] [*FOIA Exemptions* 2 and 5

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